

Bruce Isaacs, Esq., SBN 100926
Robert A. Wyman, Esq., SBN 116975
WYMAN & ISAACS LLP
8840 Wilshire Blvd., Second Floor
Beverly Hills, CA 90211
E-mail address: bisaacs@wymanisaacs.com
Tele: (310) 358-3221
Fax: (310) 358-3224

Attorneys for Defendants
GALE ANN HURD and
PACIFIC WESTERN PRODUCTIONS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE BRANCH

NEIL B. GOLDBERG,) Case No.: C05-03534 (RMW)
) (Assigned to the Hon. Ronald M. Whyte in
Plaintiff,) Dept. "6")
)
vs.) DEFENDANT GALE ANNE HURD'S AND
) PACIFIC WESTERN PRODUCTIONS,
) INC.'S ANSWER TO PLAINTIFF NEIL B.
JAMES CAMERON and GALE ANN) GOLDBERG'S THIRD AMENDED
HURD, PACIFIC WESTERN) COMPLAINT
PRODUCTIONS, INC. and DOES 2)
through 10,000, inclusive,)
)
Defendants.)
)

1 Defendant Gale Anne Hurd "(Hurd)" and Pacific Western Productions, Inc.
2 ("Pacific Western") (collectively, "Hurd" or "her" or "she") hereby answer the Third
3 Amended Complaint ("TAC") of Plaintiff Neil B. Goldberg ("Goldberg") by
4 admitting, denying and alleging as follows:

5
6 **PRELIMINARY STATEMENT**

7 In its February 27, 2007 Order, this Court ruled that Goldberg's copyright
8 claims pertaining to "Terminator" movies which pre-date August 31, 2002 are
9 untimely. As a result, this Court specifically ruled that Goldberg's copyright claims
10 relating to "Terminator" ("T-1") and "Terminator 2: Judgment Day" ("T-2") are time
11 barred. In particular, the Court ruled that "plaintiff's purported lack of knowledge
12 was unreasonable, plaintiff is unable to assert his alleged copyright claims,
13 continuing or otherwise, prior to August 31, 2002." February 27, 2007 Order, p. 13:
14 7 – 8. In addition, in its February 27, 2007 Order, the Court held that Goldberg's
15 implied contract claims as to T-1 and T-2 are likewise untimely. February 27, 2007
16 Order, p. 14: 26 – 27.

17 In its July 10, 2009 Order, this Court granted Hurd's motion for summary
18 judgment and ruled that Goldberg has no direct copyright infringement claim against
19 Hurd (or Cameron).

20 However, as the Court also ruled on July 10, 2009, Goldberg was permitted to
21 move forward with a contributory copyright infringement claim against Hurd, based
22 solely on her 1998 Assignment Agreement, relating to Terminator movies or
23 televisions shows which post-date August 31, 2002. In this respect, the Court
24 permitted Goldberg to move forward with his contributory copyright infringement
25 claim as to "Terminator 3: Rise of the Machines" ("T-3"), released in 2003, the "Sarah
26 Conner Chronicles" (the "Terminator Television Show"), which first aired in 2008
27 and "Terminator Salvation" ("T-4"), released in 2009.
28

1 Hurd contends that Goldberg's Third Amended Complaint is an attempt by
2 Goldberg to circumvent the Court's prior orders. In particular, Goldberg seeks to
3 "back-door" a direct copyright infringement claim by reviving claims pertaining to T-
4 1 and T-2 under the guise that he was do so in order to prosecute claims pertain to T-
5 3, the Terminator Television Series and T-4. Hurd contends that the Court should not
6 condone this disingenuous tactic implemented by Goldberg by way of his Third
7 Amended Complaint.

8 In addition, Goldberg's contributory copyright infringement claim is based on
9 a flawed legal theory that defies common sense. It is undisputed that one of the
10 requisite elements of a contributory copyright infringement claim is that a defendant,
11 in this case Hurd, must have had actual knowledge of the direct infringement.
12 Goldberg's entire claim focuses on various representations and warranties purported
13 made by Hurd in 1998 as set forth in the Assignment Agreement by which she
14 granted the sequel rights to the Terminator franchise. At the time of her
15 representations and warranties in 1998, Hurd could not possibly have knowledge that
16 a movie released five years in the future, T-3, a television show aired ten years in the
17 future, the Terminator Television Show, or a movie released eleven years in the
18 future, T-4, would purportedly contain infringing elements. It is simply not possible
19 for Hurd to have knowledge in 1998 of purportedly infringing movies and television
20 shows which had not yet been written, developed, produced, distributed or exploited.

21 In short, the premise of Goldberg's contributory copyright infringement claim
22 defies logic and Goldberg should not be permitted to use this flawed contributory
23 copyright infringement claim as a device to re-litigate claims relating to T-1 and T-2
24 in violation of this Court's prior orders.

25 **NATURE OF THE ACTION**

26
27 1. Hurd admits that this action is brought under the Copyright Act, denies
28 that Goldberg's story or music is original or contains protectable expression and
conveys the mood of a world controlled by machines heading toward destruction,

JURISDICTION AND VENUE

11. Hurd admits the allegations of this paragraph.

PURPORTED FACTUAL BACKGROUND

12. Hurd lacks sufficient information and belief to answer the allegations of this paragraph and, basing her denial on that ground, denies the allegations of this paragraph.

13. Hurd lacks sufficient information and belief to answer the allegations of this paragraph and, basing her denial on that ground, denies the allegations of this paragraph.

14. Hurd lacks sufficient information and belief to answer the allegations of this paragraph and, basing her denial on that ground, denies the allegations of this paragraph.

15. Hurd lacks sufficient information and belief to answer the allegations of this paragraph and, basing her denial on that ground, denies the allegations of this paragraph.

16. Hurd lacks sufficient information and belief to answer the allegations of this paragraph and, basing her denial on that ground, denies the allegations of this paragraph.

17. Hurd denies the allegations of this paragraph.

18. Hurd admits that Gale Anne Hurd produced and received a co-writing credit on T-1 and produced T-2. Hurd admits that Cameron directed T-1 and T-2.

19. Hurd denies the allegations of this paragraph.

20. Hurd denies the allegations of this paragraph, and denies, given the Court's prior rulings, that the purported similarities relating to T-1 and T-2 are even at issue in this case.

21. Hurd denies the allegations of this paragraph, and denies, given the Court's prior rulings, that the purported similarities relating to T-1 and T-2 are even at issue in this case.

1 22. Hurd denies the allegations of this paragraph.

2 23. Hurd denies the allegations of this paragraph, as phrased, but denies that
3 that these allegations have any relevance to this action.

4 24. Hurd admits the allegations of this paragraph, and denies that these
5 allegations have any relevance to this action.

6 25. Hurd admits the allegations of this paragraph, but denies that these
7 allegations have any relevance to this action.

8 26. Hurd admits the allegations of this paragraph (but lacks information and
9 belief as to the date), but denies that these allegations have any relevance to this
10 action.

11 27. Hurd admits the allegations of this paragraph, but denies that these
12 allegations have any relevance to this action.

13 28. Hurd denies the allegations of this paragraph.

14 29. Hurd denies the allegations of this paragraph.

15 30. Hurd admits the allegations of this paragraph, but denies that these
16 allegations have any relevance to this action.

17 31. Hurd admits the allegations of this paragraph, but denies that these
18 allegations have any relevance to this action.

19 32. Hurd admits the allegations of this paragraph, but denies that these
20 allegations have any relevance to this action.

21 33. Hurd lacks sufficient information and belief to answer the allegations of
22 this paragraph and, basing her denial on that ground, denies the allegations of this
23 paragraph.

24 34. Hurd admits that she was the executive producer of T-2, that it was
25 released in 1991 and that it was a commercial success, but Hurd lacks sufficient
26 information and belief to answer the remaining allegations of this paragraph and,
27 basing her denial on that ground, denies the remaining allegations of this paragraph.

28 35. Hurd admits that she entered into the 1998 Assignment Agreement in
exchange for consideration, but otherwise denies the allegations of this paragraph.

REQUEST FOR JURY TRIAL

48. Hurd hereby requests a trial by jury.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that Goldberg has failed to set forth sufficient facts to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that this Court does not have personal jurisdiction over her pursuant to Fed. R. Civ. P. 12(b)(2) and Ninth Circuit case law.

THIRD AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that this Court is an improper venue for this action pursuant to Fed. R. Civ. P. 12(b)(3) and Ninth Circuit case law.

FOURTH AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that the claims set forth in the TAC are barred by virtue of the doctrine of independent creation.

FIFTH AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that the claims set forth in the TAC are barred by the applicable statute of limitations, including 17 U.S.C. § 507(b).

SIXTH AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that the claims set forth in the TAC are barred by virtue of the fact that there is not sufficient or actionable similarity between Goldberg's movie treatment/script entitled "Long Live Music", alternatively called "Music Warrior" (the "Treatment" or "Goldberg Treatment"), on the one hand, and any of the "Terminator" films with which Hurd was involved, on the other, as well as no sufficient or actionable similarity between Goldberg's music ("Goldberg's Music"), on the one hand, and the soundtrack in any of the "Terminator" films with which Hurd was involved, on the other.

SEVENTH AFFIRMATIVE DEFENSE

As a separate and affirmative defense to each and every claim for relief, Hurd alleges that the claims set forth in the TAC are barred by virtue of the fact that certain elements of Goldberg's Treatment that were allegedly infringed are mere ideas, are not original, are not protectable expression and/or worthy of copyright protection. It is Hurd's position that it is Goldberg's burden of proof to show that certain elements of the Treatment that were allegedly infringed are more than mere ideas, are original, are protectable expression and/or are worthy of copyright protection. To the extent the burden of proof shifts to Hurd, Hurd contends that certain elements of the Treatment that were allegedly infringed are mere ideas, are not original, are not protectable expression and are not worthy of copyright protection. In addition, Goldberg's claims are also barred by virtue of the fact that Goldberg's Music, or any portion thereof, that was allegedly infringed is not original, protectable expression or worthy of copyright protection. It is Hurd's position that it is Goldberg's burden of proof to show that Goldberg's Music that was allegedly infringed is original. To the extent the burden of proof shifts to Hurd, Hurd contends that neither Goldberg's Music, nor any portion thereof, that was allegedly infringed is original, protectable expression or worthy of copyright protection.

1 **EIGHTH AFFIRMATIVE DEFENSE**

2 As a separate and affirmative defense to each and every claim for relief, Hurd
3 alleges that the claims set forth in the TAC are barred by virtue of the fact that the
4 purported similarities, if any, are non-protectable expression and are unprotectable
5 scenes-a-faire.

6
7 **NINTH AFFIRMATIVE DEFENSE**

8 As a separate and affirmative defense to each and every claim for relief,
9 Hurd alleges that the claims set forth in the TAC are barred by virtue of the fact that
10 certain elements of the Goldberg Treatment and Goldberg's Music are based upon
11 prior art.

12
13 **TENTH AFFIRMATIVE DEFENSE**

14 As a separate and affirmative defense to each and every claim for relief,
15 Hurd alleges that certain or all elements of the Goldberg Treatment and Goldberg's
16 Music are in the public domain.

17
18 **ELEVENTH AFFIRMATIVE DEFENSE**

19 As a separate and affirmative defense to each and every claim for relief,
20 Hurd alleges that Goldberg's claims are barred, in whole or in part, by the doctrine of
21 laches.

22
23 **TWELFTH AFFIRMATIVE DEFENSE**

24 As a separate and affirmative defense to each and every claim for relief, Hurd
25 alleges that to grant relief to Goldberg as he requests would unjustly enrich Goldberg.

1 **THIRTEENTH AFFIRMATIVE DEFENSE**

2 As a separate and affirmative defense to each and every claim for relief, Hurd
3 alleges that Goldberg's claims are barred, in whole or in part, by the doctrine of
4 estoppel.

5
6 **FOURTEENTH AFFIRMATIVE DEFENSE**

7 As a separate and affirmative defense to each and every claim for relief, Hurd
8 alleges that Goldberg's claims are barred by virtue of the doctrine of waiver.

9
10 **FIFTEENTH AFFIRMATIVE DEFENSE**

11 As a separate and affirmative defense to each and every claim for relief, Hurd
12 alleges that Goldberg's claims are barred by virtue of his own improper or inequitable
13 conduct.

14
15 **SIXTEENTH AFFIRMATIVE DEFENSE**

16 As a separate and affirmative defense to each and every claim for relief, Hurd
17 alleges that Goldberg's claims are barred by virtue of Goldberg's unclean hands.

18
19 **SEVENTEENTH AFFIRMATIVE DEFENSE**

20 As a separate and affirmative defense to each and every claim for relief, Hurd
21 alleges that the claims set forth in the TAC are barred by virtue of the fact that
22 Goldberg suffered no damages caused by Hurd's conduct.

23
24 **EIGHTEENTH AFFIRMATIVE DEFENSE**

25 As a separate and affirmative defense to each and every claim for relief, Hurd
26 alleges that she had no involvement in the development or creation of T-3, the
27 Terminator Television Show or T-4.

1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 As a separate and affirmative defense to each and every claim for relief, Hurd
3 alleges that she has not been involved and is not a distributor, broadcaster, or
4 exhibitor and thus any exploitation of T-1 or T-2 within three years of the filing of
5 this action was conducted by third parties, not by her.

6
7 **TWENTIETH AFFIRMATIVE DEFENSE**

8 As a separate and affirmative defense to each and every claim for relief, Hurd
9 alleges that Goldberg's claims are barred by the doctrine of fair use.

10
11 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

12 As a separate and affirmative defense to each and every claim for relief, Hurd
13 alleges that Goldberg's claims are barred because her actions were legally justified.

14
15 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

16 As a separate and affirmative defense to each and every claim for relief, Hurd
17 alleges that Goldberg's claims are barred because her actions were privileged,
18 justified and Goldberg had no right to rely on any representations or warranties set
19 forth in the 1998 Assignment Agreement and no standing to complain about any of
20 the terms and conditions set forth in that agreement.

21
22 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

23 As a separate and affirmative defense to each and every claim for relief, Hurd
24 alleges that the purported property rights in and to certain elements of the Goldberg's
25 Treatment or Goldberg's Music, which Goldberg alleges were infringed, are owned
26 and controlled by parties other than Goldberg and, as such, Goldberg has no standing
27 to sue.

1 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

2 As a separate and affirmative defense to each and every claim for relief, Hurd
3 alleges that the claims set forth in the TAC are barred by virtue of the fact that
4 Goldberg does not own or control the exclusive copyright in and to certain elements
5 of the Goldberg Treatment or Goldberg's Music.

6
7 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

8 As a separate and affirmative defense to each and every claim for relief, Hurd
9 alleges that to the extent she has any liability for contributory copyright infringement,
10 which Hurd denies, but assumes solely for the sake of asserting this defense, any
11 contributory infringement or violation occurred without knowledge and with innocent
12 intent.

13
14 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

15 As a separate and affirmative defense to each and every claim for relief, Hurd
16 alleges that Goldberg is precluded from recovering statutory damages and/or
17 attorney's fees for copyright infringement by virtue of 17 U.S.C. § 412.

18
19 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

20 As a separate and affirmative defense to each and every claim for relief, Hurd
21 alleges that Goldberg is precluded from any relief whatsoever because he has failed
22 to join necessary and indispensable parties, the alleged infringers themselves.

23
24 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

25 As a separate and affirmative defense to each and every claim for relief, and
26 without shifting the burden of proof, Hurd alleges that Goldberg is precluded from
27 any relief whatsoever because it is impossible to show that Hurd had knowledge in
28 1998 that future sequels and televisions shows, which had not yet been written,
developed, produced, distributed or exploited, and which were not released or aired

1 until 2003, 2008 and 2009, would be infringing even assuming arguendo that
 2 Goldberg's allegations have any merit (which Hurd denies).

3
 4 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

5 As a separate and affirmative defense to each and every claim for relief, and
 6 without shifting the burden of proof, Hurd alleges that Goldberg is precluded from
 7 any relief whatsoever because Hurd did nothing in connection with the 1998
 8 Assignment Agreement, and engaged in no other conduct, which materially
 9 contributed to or induced infringement as to any other party in connection with T- 3,
 10 the Terminator Television Show or T-4 or any other copyrighted work.

11
 12 Hurd hereby reserves the right to assert additional affirmative defenses that
 13 become available or apparent during the pendency of this action.

14
 15 WHEREFORE, Hurd prays for judgment as follows:

- 16 1. that Goldberg take nothing by virtue of his TAC;
 17 2. for costs of suit incurred herein;
 18 3. for her attorney's fees according to proof; and
 19 4. for such other and further relief as the Court deems just and
 20 proper.

21
 22 Date: December 18, 2009 WYMAN & ISAACS LLP

23
 24
 25 By: s/Bruce Isaacs
 26 Bruce Isaacs, Esq.
 27 Attorneys for Defendant
 28 GALE ANN HURD and
 PACIFIC WESTERN PRODUCTIONS, INC.

CERTIFICATE OF SERVICE

Pursuant to FRCP 5, I certify that I am an employee of the law firm of WYMAN & ISAACS LLP, and that on the date shown below, I caused service of a true and correct copy of the attached:

**DEFENDANT GALE ANNE HURD'S AND PACIFIC WESTERN PRODUCTIONS, INC.'S
ANSWER TO PLAINTIFF NEIL B. GOLDBERG'S THIRD AMENDED COMPLAINT**

to be completed by:

- _____ personally delivering
_____ delivery via Reno-Carson Messenger Service
_____ sending via Federal Express or other overnight delivery service
 X depositing for mailing in the U.S. mail with sufficient postage affixed thereto
_____ delivery via facsimile machine to fax no. _____
 X electronic filing, and thereby delivery via e-mail to:

Jefferson T. Stamp, Esq.
15650-A Vineyard Blvd., #146
Morgan Hill, CA 95037
Jtstamp2002@yahoo.com
(Attorney for Plaintiff NEIL GOLDBERG)
VIA U.S. MAIL

Charles N. Shephard, Esq.
Greenberg Glusker Fields Claman
Machtiger & Kinsella LLP
1900 Avenue of the Stars
Suite 2100
Los Angeles, CA 90067-4590
cshephard@ggfirm.com
Facsimile: (310) 553-0687
VIA U.S. MAIL

Dated this 18th day of December, 2009

/s/Lina Pearmain
Lina Pearmain